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No. 632

In the Supreme Court of the United States

OCTOBER TERM, 1957

OLIVER W. TOLL, PETITIONER

v.

JOHN W. GWYNNE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

No opinion was filed by the District Court. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–3a) is reported at 247 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1957 (Pet. App. 4a). A petition for rehearing, timely filed, was denied on September 3, 1957 (Pet. App. 12a). By order of the Chief Justice, entered on September 17, 1957, the time for filing a petition for a writ of certiorari was extended to November 30, 1957. The petition for a writ of

certiorari was filed on November 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether both courts below correctly held that petitioner's rights under the Veterans' Preference Act were not violated by his separation, because of a reduction in force, from an attorney position in the Federal Trade Commission.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Veterans' Preference Act of 1944, 58 Stat. 387, as amended, and of the "Retention Preference Regulations for Use in Reductions in Force" in effect at the time of petitioner's separation appear in the appendix to the petition at pages 16a–19a, 21a–28a.

STATEMENT

On September 8, 1953, petitioner, a veterans' preference eligible (R. 4, 35), employed by the Federal Trade Commission, received a notice of separation (R. 44–46). This notice was sent as part of a general reduction in force at the Commission (R. 41–43, 44).

Petitioner's employment history is as follows: Starting in 1934, he served intermittently in various legal capacities in different federal agencies (R. 4–5, 35). Because of this service he acquired a competitive civil service status in 1942 under the provisions of the Ramspeck Act, 54 Stat. 1211, 5 U. S. C. 631a, 631b, and Executive Order 5743, 6 F. R. 2117. In 1947, however, attorneys' positions were "excepted"

from the competitive service by Executive Order 9830, 12 F. R. 1259. Moreover, Executive Order 10180, 15 F. R. 7745, in implementing the Whitten Amendment, 64 Stat. 1066, provided, in general, that after September 1, 1950, "reemployment of former Federal employees shall be on a nonpermanent basis." In compliance with these two orders, when petitioner returned to the Government after another break in federal service from January 27, 1949 to June 11, 1951 he was given an "excepted" and "indefinite" appointment as attorney-advisor, GS–11, in the Federal Trade Commission (R. 5, 35, 40). He served in this position until his separation in October 1953 (R. 40, 44–45).

The separation notice received by petitioner in September 1953 pointed out that his "selection for separation has been made in accordance with Civil Service regulations governing reduction-in-force" (R. 45). The Civil Service Commission's "Retention Preference Regulations for Use in Reductions in Force" which governed petitioner's separation provided that for the purpose of determining the order of separation employees should be divided into Groups I, II, and III, according to tenure of employment. 5 C. F. R. 20.4 (c), Pet. App. 23a–24a.[1] Group I, which has the highest retention priority and is the group last reached in separations necessitated by a reduction in force, consists of career employees in the

[1] The reduction in force regulations in effect at the time of petitioner's separation are printed at Pet. App. 21a–28a. The curren' regulations, which are substantially the same, appear as Part 20 of the Commission's regulations in the Federal Personnel Manual, pp. Z1–285, *et seq.*

competitive service and also employees serving in attorney or other "excepted" positions "under appointments with no conditions or restrictions" (*id.*). Group II, which has the second highest priority, is composed of career-conditional employees in the competitive service and "excepted" employees "who are conditional solely as the result of promotion or reinstatement" (*id.*). Group III, which has the lowest priority, is composed of employees

> * * * serving under nonstatus non-temporary appointments in positions in the competitive service. It also includes employees in positions excepted from the competitive service serving under any condition or limitation other than a conditional promotion or reinstatement or a specific time limitation of 1 year or less. [*id.*]

Within each of these three tenure groups employees are further divided into subgroups according to veterans' preference. Thus, veterans' preference eligibles are in subgroups I–A, II–A, and III–A, while employees without veterans' preference are in subgroups I–B, II–B, and III–B (*id.*).

As already noted, petitioner's appointment was both indefinite and excepted and he was a veteran. He was therefore placed in subgroup III–A on the Grade GS–11 retention register (R. 44, 125, 126). Three other attorneys were on the register in the same grade or competitive level, *i. e.*, GS–11 (R. 125). These three attorneys were not serving under indefinite appointments so that they had greater tenure than petitioner and were in subgroup I–A (R. 125). Of the four employees involved, petitioner had the least retention standing (R. 125). His name, accord-

ingly, was "properly reachable [in the] reduction in force" (R. 43, Pet. App. 35a).

Petitioner appealed his separation to the Civil Service Commission on September 16, 1953 (R. 110). His appeal raised two main points: (1) the allegedly excessive narrowness of the competitive level and (2) his alleged right to be reassigned to a GS–9 position held by two other III–A employees named Sloan and Hubler, both of whom were alleged to have fewer "retention credits" (R. 7, 118–120, 122). On April 9, 1954, the Chief, Appeals Examining Office, Civil Service Commission, notified petitioner that a review of his case had not disclosed any irregularities under the Retention Preference Regulations, that the competitive area and competitive level were in accord with the regulations, that the retention register had been set up properly, that petitioner's name was reached in order, and that he had received a valid separation notice (R. 43, Pet. App. 34a–36a).

The Board of Appeals and Review of the Civil Service Commission, in affirming this decision, later advised petitioner that he was the only GS–11 attorney in the Headquarters office of the Federal Trade Commission so that he would have been the first employee to be affected by a reduction in force of GS–11 attorneys even if the competitive level, which petitioner had contended was too narrow, had been broadened to include all GS–11's (Pet. App. 38a). This fact is further confirmed by an affidavit of the Personnel Director of the Federal Trade Commission (R. 47). The Board of Appeals and Review

also rejected petitioner's contention that he should have been allowed to bump either Sloan or Hubler since they, like petitioner, were in subgroup III-A.

Petitioner then filed the present action in the District Court on January 26, 1955, seeking a declaration of his rights as a veterans' preference eligible and an order restoring him to Government employment (R. 1, 16–17). His complaint, in asserting a violation of his separation or retention rights, set forth the same two contentions earlier rejected by the Civil Service Commission. In addition, the complaint asserted a separate and distinct cause of action arising out of alleged violations of his re-employment rights under the Veterans' Preference Act. The complaint also alleged violation of his procedural rights during the appeal to the Civil Service Commission (R. 2, 3, 12, 16). Respondents filed an answer, which in substance denied any violations of petitioner's rights (R. 34–39). Respondents also filed a motion for summary judgment, supported by affidavits and the pertinent records of the Federal Trade and Civil Service commissions (R. 39–47). The District Court granted the motion for summary judgment and dismissed the complaint (R. 135).

The Court of Appeals reversed and remanded with respect to the cause of action based on alleged re-employment rights violations. On that phase of the case (not now before this Court), the court below viewed the record as inadequate for disposition by summary judgment. With respect to the other main cause of action, based on alleged separation rights violations, the Court of Appeals affirmed the District

Court, unanimously rejecting the contention that petitioner was a competing employee with holders of lower grade positions and that he should have been retained in their stead. A majority of the court also held that "the record discloses no basis either procedurally or factually, for [petitioner's] allegations of conspiracy or bad faith" (Pet. App. 3a).

ARGUMENT

Petitioner's principal contention is that his veterans' preference rights were violated when he was released from his job at the Federal Trade Commission in the course of a reduction in force at that agency. But, in light of the applicable statutory provisions, both courts below—in addition to the Civil Service Commission and the Federal Trade Commission—found, on a review of the pertinent facts, that there was no such violation. These concurrent findings are, as we show below, plainly correct. They need not and, we submit, should not be again reviewed by this Court.

1. Section 12 of the Veterans' Preference Act of 1944 provides that in a reduction in force "competing employees shall be released in accordance with Civil Service Commission regulations," which must give due effect to "tenure of employment, military preference, length of service, and efficiency ratings." This explicit statutory reference to "competing employees" and the decision of this Court in *Elder* v. *Brannan*, 341 U. S. 277, reiterate the established principle that a veteran's preference in job retention operates only within his competing group. Cf. *Fass* v. *Gray*, 197

F. 2d 587 (C. A. D. C.), certiorari denied, 344 U. S. 839. This was as true before the Veterans' Preference Act as it is today. 341 U. S. at 284. Prior consistent administrative practice had earlier established the need and propriety of confining preference to competing groups. See, *e. g.*, 34 Ops. Atty. Gen. 159, 161 (1924); 38 Ops. Atty. Gen. 79, 83 (1934); Executive Order 4240 (1925); Executive Order 5068 (1929); and Executive Order 8705, 6 F. R. 1313 (1941). These requirements of Section 12 are implemented by the following Civil Service Commission regulation:

> No employee in a position excepted from the competitive service may be separated * * * in a reduction in force if a competing employee with lower retention standing is retained in the same competitive level. [5 C. F. R. 20.5 (c), Pet. App. 26a.]

"Competitive level" is defined to encompass all similar positions within a particular area in which employees could be readily interchanged without undue interruption to the work program. 5 C. F. R. 20.2 (f), Pet. App. 22a.[2]

There can be no room for doubt that this statutory preference was given full effect in the separa-

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[2] The regulations in effect at the time of petitioner's separation stated that "[g]enerally such positions will be in the same grade or occupational level, but this is not necessary if the other tests are met." 5 C. F. R. 20.2 (f), Pet. App. 22a. Here, the Federal Trade Commission had determined that the general rule was applicable and that the competitive level would be limited to the single grade. (Pet. App. 35a, 39a.) And, since December 16, 1954, the definition of competitive employee has stated categorically that "[s]uch positions are in the same grade or occupational level." 19 F. R. 8618 (1954).

tion involved here. Indeed, petitioner does not challenge the ruling of both the Federal Trade and Civil Service commissions that he had a lower retention standing than any other GS–11 on the same retention register, or the sworn statement of the Federal Trade Commission's Director of Personnel that petitioner would have been reached for reduction in force even if "all Grade GS–11 attorneys throughout the Federal Trade Commission had been placed in the same competitive level" (R. 46–47). Petitioner contends that he had greater retention credits than two attorneys who occupied GS–9 positions (R. 7, 36, Pet. 13–14). However, as noted by the Civil Service Commission, these attorneys were obviously "not competing employees under the terms of the Retention Preference Regulations inasmuch as they were serving as Attorney-Adviser GS–9" (Pet. App. 39a). No serious question can be raised, we submit, as to the propriety of using different grade levels as a standard for measuring the extent of "competitive levels". Indeed, the administrative practice in effect when the Veterans' Preference Act of 1944 was enacted refutes petitioner's contention that he is entitled to intergrade competition. The regulations provided that "the class in which the contemplated reduction in force is to be made shall include all positions allocated to the same class, service, and grade * * *." 5 C. F. R. (1943 Supp.) 12.303.

Moreover, the Civil Service Commission's ruling that the agency correctly defined "competitive level" to include GS–11's but to exclude GS–9's is, we submit, not appropriate for judicial reexamination and

review. As noted by the court below in passing on a similar veterans' preference question in *Wagner* v. *Higley,* 235 F. 2d 518, 519 (C. A. D. C.), certiorari denied, 352 U. S. 936, the scope of judicial review of questions of this kind is necessarily limited. And such judicial non-intervention in the field of personnel administration has long been recognized by this Court. *Eberlein* v. *United States,* 257 U. S. 82; *Burnap* v. *United States,* 252 U. S. 512; *Brown* v. *Lane,* 232 U. S. 598; *Reagan* v. *United States,* 182 U. S. 419, *Keim* v. *United States,* 177 U. S. 290; *White* v. *Berry,* 171 U. S. 366; *In re Sawyer,* 124 U. S. 200; *United States* v. *Guthrie,* 17 How. 284; *In the Matter of Hennen,* 13 Pet. 230. In each of these cases this Court refused to substitute its own judgment for that of the administrative agency on personnel matters. And, since there has been no violation of the agency's own regulations, *Accardi* v. *Shaughnessy,* 347 U. S. 260 and *Service* v. *Dulles,* 354 U. S. 363 are inapposite here.

Furthermore, the court below, citing *Hoffman* v. *Brucker,* 244 F. 2d 780 (C. A. D. C.), correctly rejected petitioner's assertion that the preference afforded by Section 12 requires recognition of bumping rights, *i. e.,* reassignment of an employee reached in a reduction in force to a position in a lower competitive level for which he is qualified if the occupant is in a lower subgroup. Prior to the Veterans' Preference Act, bumping rights were not required either by statute or by the reduction in force regulations of the Civil Service Commission although agencies, at their discretion, could grant such rights. See 5

C. F. R. (1943 Supp.) 12.309 (a). Thus, there was no prior practice in regard to reassignment rights which could be preserved by Section 18 of the Veterans' Preference Act, 5 U. S. C. 867.

Strong support and confirmation of these views appear in the report of the subcommittee on Federal Manpower Policies of the Senate Committee on Post Office and Civil Service which investigated this and related problems of reductions in force. See S. Rep. No. 2102, 82d Congress, 2d Session, on "Reduction-in-Force System in the Federal Government" (July 4, 1952), at p. 42; see also *Holcomb* v. *United States,* 146 F. Supp. 224, 228 (C. Cls.), certiorari denied, 352 U. S. 935.

2. While the Veterans' Preference Act does not give a veteran a statutory right to "bump" or displace "non-competing" employees, Section 12 in no way prohibits according such a preference to a veteran. For that reason, the Civil Service Commission's regulations, which allow a veteran's reassignment to a position held by a non-competing employee in another competitive level, are valid. See, *e. g., Fass* v. *Gray,* 197 F. 2d 587, (C. A. D. C.), certiorari denied, 344 U. S. 839; *Powell* v. *Brannan,* 196 F. 2d 871 (C. A. D. C.). It is only under the regulation that displacement of a non-competing employee holding a lower-paying job in a lower grade level is possible. This bumping is discretionary with the agency and, as already noted, is entirely different from the statutory right to be retained over competing employees in the same competitive level occupied at the time of the reduction in force.

Bumping rights come into play only where an employee seeks to bump another employee in a lower grade level. Here, petitioner, as a GS–11, sought to displace either one of two GS–9 attorneys. All three attorneys, however, were veterans and in tenure subgroup standing III–A. The bumping regulations permit bumping only where the employee to be bumped is in a "lower subgroup standing." (5 C. F. R. 20.5 (b) (2), Pet. App. 26a.) Since the two GS–9 attorneys whom petitioner sought to displace had the same subgroup standing as petitioner, he was not permitted to bump them. As explained by the Civil Service Commission, the "Regulations do not permit reassignments to positions occupied by employees in the same subgroup as that occupied by the employee being reassigned" (Pet. App. 39a–40a).

Contrary to petitioner's assertion, this restriction on bumping is plainly valid, and is in fact essential to avoid serious organizational dislocation. It must be remembered that reassignment or bumping entails the right to displace an incumbent employee who himself in turn may be entitled to reassignment. This, as found by a Senate subcommittee investigating the problem, leads to "chain reactions," the "virtual restaffing of an agency" with resulting "confusion," serious disruption of agency operations, and the lowering of "unit production as much as 50 percent." S. Rep. No. 2102, 82d Congress, 2d Session, on "Reduction-in-Force System in the Federal Government" (July 4, 1952) at page 41.[3]

[3] Petitioner's further contention that Section 20.5 of the reduction in force regulation is invalid because it does not

3. The record shows that petitioner was not denied any substantial or material right in the course of his administrative hearing.[4] His complaint that he was denied the right to submit evidence on the issue of the excessive narrowness of his competitive level is pointless. For, no matter how cumulative the evidence, the fact remains that even if all GS–11's were in his competitive level he would have been separated. Furthermore, if the evidence he sought to present related to the jobs of the GS–9 attorneys whom petitioner sought to displace, it was properly rejected because they occupied lower grade positions which obviously were in a different and lower competitive level.

There is also no merit to the contention that the record does not support the grant of summary judgment on the issue of bad faith. Petitioner places principal reliance on *Goldman* v. *Summerfield,* 214 F. 2d 858 (C. A. D. C.), but there the Government failed to file an answer, to submit affidavits, or to vouch for the authenticity of the exhibits. This case is entirely different for the present record shows that an answer was filed (R. 34–39), that affidavits were submitted

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afford bumping privileges to positions in the "excepted" service or to indefinite tenure appointees must be rejected for the same reasons. Petitioner could properly have been denied bumping rights on any one of these grounds.

[4] It should be noted that neither Section 12 of the Veterans' Preference Act (Pet. App. 17a) nor the reduction in force regulations of the Civil Service Commission require that an employee separated as a result of a reduction in force be given a hearing although the regulations permit such an employee to appeal to the Civil Service Commission. 5 C. F. R. 20.9, Pet. App. 27a.

(R. 46), and that the exhibits were properly authenticated (R. 40, 44). It is also evident that the court below gave full consideration to petitioner's objections to the disposition of the case on motion for summary judgment since it reversed the District Court's grant of summary judgment against petitioner on the issue of his re-employment rights.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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